SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 62

THOMAS R. KAISER,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S REPLY TO PETITIONER'S REPLY BRIEF

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Introduction

In his Reply Brief, Petitioner continuously employs an extraordinary new intellectual method which may be deemed advocacy by epithet. He adverts to a particular portion of Respondent's Brief and then characterizes it with the epithet "absurd" or some equally discourteous description. The only absurdity in this case is Petitioner's repetitious invocation of the word "absurd" and analogous incivilities. Petitioner employs the word "absurd" and similar characterizations at least eight times (on pages 16, 19, 20, 22, 28, 30, 39 and 41) without once successfully demonstrating that the formulations to which he is directing his strictures are either absurd, or, indeed, lacking in merit. As is so often the case when epithets are made to do service for analysis, both Petitioner's Brief and his

Reply Brief exhibit serious deficiencies. Presumably, the tactic of invective was invoked in Petitioner's Brief in order to divert attention from the significant inadequacies of conception which are displayed in Petitioner's submissions to this Court.

A. Petitioner's Comments on the Fifth Amendment Question in His Reply Brief Are Lacking in Merit.

On page 2 of his Reply Brief, Petitioner declares that it "is of some note that the Respondent finds no Fifth Amendment value involved in wiretapping. . . . , but elsewhere urges that for all practical purposes, it was appropriate for the Petitioner's wiretapped conversations to be characterized as 'confessions'."

It is not clear why the Petitioner thinks that these described standpoints of Respondent are "of some note". Respondent's view that this case presents no violation of the privilege against self-incrimination was based upon the fact that the secret interception of a telephone conversation can hardly be viewed as compelling the incriminating statements made in the course of that conversation by the conversants. Respondent simply urges that the conversations in question, though containing statements tantamount to admissions of guilt, were not compelled by official authority. In the secret eavesdrop situation, there is lacking the obvious presence of official authority which is characteristic of the custodial interrogation situation. Thus, there is no inconsistency between these positions of the Respondent juxtaposed for supposed argumentative effect by Petitioner, and his comment in this regard is idle and forceless.

Petitioner also states on page 2 that Respondent has not dealt "with the problem posed by the decision of *Miranda* v. *Arizona* during the course of the trial. . ." If Respondent has omitted a detailed reply to Petitioner's *Miranda* argument, it is only because that argument is so

obviously lacking in demonstrative power that it hardly merits the attention of a reply.

Even if it be assumed, arguendo, and contrary to fact, that Petitioner's *Miranda* argument has merit, he does not show that he is entitled to assert it in this forum, because he does not allege or demonstrate in his Briefs that he preserved his constitutional claim in this regard by moving for a mistrial or making any appropriate motion for relief at the point in the trial when the *Miranda* decision was promulgated by this Court.

The essence of Petitioner's *Miranda* contention would appear to be that the *Miranda* decision, coming in the middle of the *Kaiser* trial, heightened the impression of the average individual "as to the damning nature of a true confession". But the prosecutor did not state that the conversations in question were "a true confession" or that they constituted a confession in the presence of official authority of the type given in *Miranda*. Indeed, his remarks indicated clearly to the contrary. Moreover, Petitioner cites no evidence that the jurors in the *Kaiser* trial were even familiar with the *Miranda* decision, let alone evidence that it influenced their deliberations.

Furthermore, on any rational analysis, it is difficult to conceive how the *Miranda* decision could have changed the impression of the average individual as to the evidentiary significance of a confession. It was common public knowledge, both before *Miranda* and after it, that a confession of guilt was a statement by the accused that he was guilty. It is thus hard to understand how *Miranda* could have changed the content of public understanding except upon the obviously untenable assumption that, after *Miranda*, the public mind viewed the confessor as "very guilty", whereas previous to *Miranda* they viewed him only as "guilty".

In truth, it has always been the popular view that one who confesses his guilt is guilty and that such evidence

ought to be conclusive on the issue. The Legislatures in some of the States have sought to curb the operation of this tendency of popular thought by requiring proof in addition to a confession as a pre-condition to a judgment of guilt. The *Miranda* case did not change the public conception of the significance of a confession; it simply indicated to the public what they already knew, i.e., that the introduction in evidence of a confession may play a part in producing a verdict of guilty and that the law insists, therefore, that such evidence is not admissible where it is the product of coercion. The effect of *Miranda* upon the trial in question (if, indeed, there was any effect) is more likely to have been beneficial to the defendant in emphasizing that the law regards all confessions as suspect unless they undergo an ordeal of justification.

However, the confession in *Miranda,* having been obtained by custodial interrogation, obviously had nothing in common with the admissions of guilt over the telephone involved in the *Kaiser* case. Thus even if the jurors had derived from *Miranda* a "heightened impression" of the "damning nature" of a confession obtained during custodial interrogation, that would not have influenced their belief as to the evidentiary effect of the statements made by *Kaiser* in a telephone conversation in which neither of the participants were in official custody.

B. Petitioner's "Standing" Argument in His Reply Brief Is Not Well Taken.

Petitioner argues on pages 3 and 4 of his Reply Brief that Respondent may not raise the issue of standing in this Court because the New York Court of Appeals "passed upon the issue of probable cause" and thus presumably recognized the standing of Petitioner to raise this question. Respondent discusses in its main Brief the question of whether the Court of Appeals passed upon this issue and will not repeat that discussion in this Brief. It is suffi-

cient to say that even if Petitioner's contention in this regard were correct, that would avail him little, since this Court has held that it may refuse to pass on a constitutional issue on the ground of lack of standing even where the State Court has found that the suitor has standing. (See *Doremus* v. *Bd. of Ed.*, 342 U. S. 429.)

In his argument to the contrary, Petitioner cites certain cases on page 4 of his Reply Brief, but these cases are not in point. They simply affirm the well established proposition that the Court will assume that an appellant has complied with all of the State procedural requirements necessary to the raising of a federal question in a State Court where the highest State Court finds or assumes that the question was properly raised under State law. These cases do not disturb the well-settled principle that this Court is and must be the final judge of whether a matter presented to it for adjudication is a bona fide case and controversy within the limits of the adjudicatory competence assigned to it by the Constitution. Indeed, the *Doremus* doctrine would seem to follow inevitably from the very nature of the judicial function in a political system of divided sovereignty and the inherent attributes of the judicial power, since the contrary approach urged by Petitioner would permit a State Court to determine the jurisdiction of the separate federal judicial establishment.

A reading of the record in this case (R 272-284) indicates that during the telephone conversations in question, *Kaiser* was speaking from a public telephone, rather than from a telephone in his own home and that he had no ownership interest in the Headline Bar in which was located the telephone which was used by the other participant in the conversations in question. On the basis of these facts, Respondent argues in his main Brief (see pp. 71-72) that Petitioner had no standing to raise questions as to whether the wiretap order herein complied with *Berger* criteria since, in Respondent's view, only the owner or possessor

of the premises in which the tapped telephone was located, could object, e.g., to the fact that the wiretap order permitted a 60 day tap on the telephone in question.

This view seems consistent with this Court's holdings in *Jones* v. *United States* (362 U. S. 257) and *Mancusi* v. *De Forte* (20 L. ed. 2d 1154) since *Kaiser*, during the telephone conversations here in issue, was *not present on the premises* of the Headline Bar where the tapped telephone was located. Even if it be assumed that Petitioner has standing to raise the issue of whether the wiretapping authority had justified its interception of his conversation by an adequate showing of probable cause, it does not follow that he has standing to contest the issue concerning the compliance of the order with the other criteria fashioned by this Court although nowhere mentioned in the language of the Fourth Amendment. (The question of the retroactive application of these criteria is dealt with elsewhere.)

C. Petitioner's Argument in His Reply Brief Concerning Retroactivity Should Not Be Accepted by This Court.

In the portion of his Reply Brief dealing with the retroactivity issue (commencing on page 7), Petitioner attempts to distinguish this case from *Fuller* v. *Alaska* since he concedes that "on its face ... the *Fuller* decision would appear to deprive the Petitioner of his arguments concerning the application of Section 605 to his case." It is submitted that Petitioner's attempts at distinction are uniformly unsuccessful.

Petitioner argues that the prosecutor in *Fuller* was acting in good faith. First, it may be noted that this Court, in *Fuller*, gave absolutely no indication that the prosecution's activities in *Fuller* were conducted in better faith than the evidence-gathering efforts of law enforcement officials in *Lee* v. *Florida*, or other wiretap cases. Indeed, a distinction to this effect would seem to violate the *Fuller*

rationale since the Court appears to have equated the *Fuller* situation, involving a telegram, with wiretap cases in its statement that "... the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible. Retroactive application of *Lee* would overturn every State conviction obtained in good-faith reliance on *Schwartz*". In view of this clear pronouncement in *Fuller*, Petitioner's attempts to distinguish the present case on the ground that *Fuller* involved a telegram and not a wiretap and that the *Fuller* authorities were thus operating in good faith whereas the authorities in this case were not is obviously a futile effort.

In the section of its main Brief concerning retroactivity, Respondent demonstrates in extenso that the authorities herein relied upon existing law in good faith. The *Fuller* decision can only be regarded as a validation of Respondent's contention in this regard in its holding that the rule of *Lee* v. *Florida* shall not be given retroactive effect and shall be applied only to trials occurring after the date of the *Lee* decision. Since the trial of *Kaiser* occurred long before the *Lee* decision was pronounced, it is thus not governed by the *Lee* holding that evidence violative of Section 605 of the Federal Communications Act is not admissible in State criminal trials.

Similarly ill-fated is Petitioner's attempt, on page 9 of his Reply Brief, to distinguish this case from *Fuller* and to equate it with *Lee* on the theory that both *Lee* and *Kaiser* were before this Court "at the same time with the same issue", whereas the Petitioner in *Fuller* was not granted review until October 28, 1968 when the judgment of conviction was affirmed by this Court. Even assuming the correctness of Petitioner's statement of fact in this regard, the factual circumstances which he cites do not have the legalistic significance Petitioner assigns to them and would afford no justification in themselves for a decree of retroactivity in this case even in the absence of this Court's statement in *Fuller*.

The issue of retroactivity was decided in *Fuller* and other retroactivity cases on the basis of such momentous considerations as whether retroactivity would seriously burden our system of criminal justice. Certainly the trivial factor Petitioner cites can not weigh more heavily than the fact, found in *Fuller,* that retroactivity would needlessly overturn State convictions. Moreover, in view of the language of the *Fuller* decision, Petitioner's thesis may only be regarded as fanciful since this Court, in *Fuller,* sanctions no such principle of distinction as that urged by Petitioner, and, indeed, clearly and unequivocally indicates that its decree of "no retroactivity" shall be given blanket application in its statement that "the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*"

Petitioner argues that this is a case of first impression because it involves wiretapping and therefore the application of the *Berger-Katz* rules to this case would not amount to a retroactive adjudication. This view seems questionable at best. Even though it can be argued that the Court has not yet brought wiretapping within the regulatory scope of the Fourth Amendment, the fact is that the *Katz* and *Berger* cases declared the requirements for eavesdropping warrants and so this case would merely constitute an application of the *Berger-Katz* criteria to the facts herein presented, rather than a first statement or a first impression treatment of the standards which the Fourth Amendment mandates with respect to eavesdrop orders. Thus it may be seen that under no conceivable analysis can this case be viewed as one of first impression in the sense that the *Miranda* and *Berger* cases were, and it follows that an application of the *Berger-Katz* doctrines to this case would constitute a retroactive adjudication.

It may be noted in passing that if this Court accepts Respondent's argument concerning abatement it will be unnecessary for it to reach the issue of retroactivity with

respect to Section 605. Respondent argues in Point III of its main Brief (p. 79) that, in accordance with the doctrine of *Hamm* v. *Rock Hill,* this Court should hold that the recent enactment by Congress, after the granting of certiorari herein, of the Omnibus Crime Control and Safe Streets Act of 1968 abated and rendered inoperative the provisions of Section 605, since that Act explicitly repealed 605. This abatement argument was not advanced or considered in *Lee* v. *Florida* or *Fuller* v. *Alaska* and Respondent respectfully urges that it be accepted on this appeal because a contrary holding would, in effect, decree that although, for 34 years, it was the policy of the federal government and all of its agencies, judicial, legislative and executive, not to treat State wiretapping as violative of federal public policy, that approach should now suddenly be reversed by a policy that, for the first time, enforces 605, after it has been repealed, in a manner in which it was never enforced before by this Court or any other federal agency.

Respondent would also like to suggest to the Court a slight modification of the *Fuller* rule so as to eliminate the limited retroactive effect of the *Fuller* decision. *Fuller,* in applying the *Lee* v. *Florida* doctrine to trials occurring after the date of the *Lee* decision, was in effect providing that wiretaps authorized and obtained perhaps years before the *Lee* case in accordance with the constitutional principles then accepted were inadmissible in evidence where they were introduced in trials after *Lee.* The effect of this rule of limited retroactivity will be that many major felony cases based upon wiretap orders issued before the *Lee* decision will now be subject to dismissal because of the inadmissibility of vital wiretap evidence.

Respondent respectfully asks that this Court in this case dispel the limited retroactive effect of *Fuller* by framing a decision, in accordance with the theory of the *Stovall* rule,

which provides that all wiretap orders issued before the date of the *Lee* decision and all official wiretapping occurring before the date of *Lee* shall not be subject to the *Lee* doctrine. By this statement this Court will save many felony prosecutions from failure and will avoid the undesirable result of punishing wiretapping officials for relying upon existing law and for not anticipating, at the time of the wiretapping, a *Lee* rule which this Court itself had perhaps not yet planned or imagined at the time the wiretapping was conducted.

The rationale of *Fuller* would seem no obstacle to the enunciation of the principle here contended for since it is stated in *Fuller* that retroactive application of *Lee* "is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose . . ." In view of this unqualified assertion that retroactivity is not necessary, there would seem to be no good reason why even a limited retroactivity should be enforced.

The modification of *Fuller* here sought may be achieved by the Court without overruling itself since the statement in *Fuller* that trials occurring after the date of the *Lee* decision would be subject to the *Lee* rule was dictum. The most that the *Fuller* case really decided was that retroactivity would not be decreed where the evidence gathering violative of Section 605 and the divulgence of that evidence at the trial occurred before the *Lee* decision. Of course, under the *Fuller* decision, the *Lee* rule is not retroactively applicable on this appeal, since the wiretapping and the trial of *Kaiser* were consummated before the *Lee* decision was announced. However, in the light of this Court's declaration in *Fuller* that "prospective application of *Lee* is supported by all of the considerations outlined in *Stovall* v. *Denno*, 388 U.S. 293, 297" and in view of the needless damage that would be done to pending prosecutions based upon wiretap evidence by the limited principle of retroactivity discussed above, it is respectfully prayed that

this Court implement the purposes and value judgements that it articulated in *Fuller* by making a clear pronouncement in this case that criminal trials occurring after *Lee* need not be dismissed where they are based upon wiretap evidence obtained prior to this Court's decision in *Lee* v. *Florida*.

Unless this Court speaks out unequivocally at this time, State Judges may feel that they have no alternative but to dismiss on motion all pending prosecutions based upon wiretap evidence where such evidence is not authorized and obtained under the enabling provisions of the new permissive federal legislation set forth in the recently enacted Safe Streets Act. Such an unfortunate state of affairs would doom to failure a substantial catalogue of important felony and organized crime prosecutions presently pending in this office as well as cases of similar magnitude in many other jurisdictions.

On Pages 33 through 35 of his Reply Brief, Petitioner advances a new argument in support of his prayer that principles of law articulated after the trial in this case should be applied retroactively so as to work a reversal of the judgment of conviction herein. He declares that it is open to a defendant on direct appeal to attack "the actual oppression which the Constitution seeks to prevent. In elaborating his thesis, Petitioner states that "*Johnson* v. *New Jersey*, 384 U.S. 719, which set the timetable for the new confession rules, was concerned not with fundamental rules, but rather intermediate rules. What we mean is that the basic Constitutional question involved was that of coerced confessions. The new rules were geared toward minimizing the incidence of coerced confessions. *Johnson* was clear that in denying the application of the new rules to prior cases, it was not denying the opportunity to attack the underlying oppression which the new rules sought to prevent: the actually coerced confession."

It is a sufficient response to this argument to observe that the Court has never propounded such a distinction

as a determinant of decision in its retroactivity jurisprudence. One may search its *Johnson* decision in perpetuity without ever finding the slightest indication that the Court was guided by any such considerations as that now advanced by Petitioner.

In addition, Petitioner's thesis is based upon a failure of analysis. Petitioner to the contrary, *Miranda* was not concerned with "intermediate rules", but with "fundamental rules". In *Miranda,* this Court held that the failure to give the *Miranda* warning resulted in a situation in which the confession was compelled in violation of the privilege against self-incrimination. Thus, it violates the doctrinal essence of *Miranda* to say that the "basic constitutional question . . . of coerced confessions" was not involved.

Petitioner's discussion in this connection of the *Stovall* decision is equally faulty. Petitioner's claim to the contrary notwithstanding, the *Stovall* decision *does* involve "the actual oppression which the Constitution seeks to prevent" rather than a mere intermediate rule, since *Stovall* indicates that the absence of counsel in some situations amounts to a deprivation of due process.

D. There Is No Merit in Petitioner's Contention that Section 605 Broadened the Enclave of Privacy Guaranteed in the Fourth Amendment so as to Include Telephone Conversations within the Scope of Its Safeguards while, at the Same Time, Excluding Telephone Conversations from the Permissive Warrant Provisions which, by the Clear Terms of the Fourth Amendment, Are Applicable to All Classes of Evidence Gathering Activities within Its Regulatory Ambit.

Respondent argues in his Brief (pp. 40-42) that, contrary to Petitioner's claim, Section 605 of the Federal Communications Act may not enlarge the scope of the Fourth Amendment's protection and may not exclude any regulated class within the control of the Fourth Amendment from the Fourth Amendment's permissive warrant provisions, since

a mere statutory enactment can not amend or abrogate provisions of the Constitution. Having failed to formulate in his main Brief a tenable legalistic underpinning for his extraordinary contention in this regard, Petitioner attempts to provide a rationale in his Reply Brief, again without success.

Discussing this thesis on page 14 of his Reply Brief, Petitioner makes the startling observation that "Congressional legislation is not here at war with the Constitution, but, rather, in protecting the integrity of the communications system it is acting pursuant to the Commerce Power granted to it by Article I, Section 8 of the Constitution. Section 605 is not, therefore, a 'mere statutory enactment'; it is the implementation of an absolute Congressional power granted by the Constitution. The Respondent's argument is grounded upon a fallacious understanding of Congressional power".

It may be said in reply to this unique conception that it does violence to every known theory of constitutionalism. The only "fallacious understanding" exhibited on this point is that of Petitioner. Apparently he has not yet attained to that minimum understanding of the fundamentals of constitutional law which would have enabled him to perceive the really elementary distinction between a constitutional grant of power and a governmental exercise of that power. Petitioner fails to grasp the obvious fact that all valid federal legislation is an "implementation of an absolute Congressional power granted by the Constitution itself". Indeed, Congress may legislate only in "implementation" of the constitutional grant of authority, and if Petitioner's theory be accepted, one must conclude that it is the design of our constitutional scheme that Congress, in the day to day exercise of its legislative powers, may operate as a constitutional convention in continuous session.

E. Petitioner's Comments Concerning Respondent's Argument Against National Judicial Control of Local Telephonic Communication Is Ill-Founded.

On page 16 of his Reply Brief, Petitioner declares that Respondent has argued for local control over the privacy of communications and that this argument "is absurd in light of the national and the international nature of the telephone system. *Cf. Weiss* v. *United States,* 308 U.S. 321".

Here again, Petitioner has totally misunderstood the trend of Respondent's argument. Respondent was not, at that point, contesting the power of Congress to regulate telephonic communications. Thus Petitioner's comment and citation of the *Weiss* case are completely inappropriate. Respondent was urging the different thesis that official wiretapping should not be constitutionalized by a federal appeals court in the absence of language in the Fourth Amendment requiring it, because to constitutionalize this subject by judicial pronouncement is to remove it from the control of the legislative power and to foreclose all future experiment.

F. Petitioner's Arguments in Opposition to Respondent's Contention that Fourth Amendment Protections Should Be Circumscribed by a Contact Theory Are Lacking in Force.

On page 20 of his Reply Brief, Petitioner condemns Respondent's "speculation concerning the possible results of a determination in the Petitioner's favor" and then proceeds to indulge in the same practice himself. However, Petitioner's speculations are less obviously appropriate since the developments he envisages are not viewed as resulting from the decision of this Court, as are those discussed in Respondent's Brief.

In his analysis of Respondent's "contact" theory, Petitioner declares that it would render the Fourth Amend-

ment a nullity since it would remove from the ambit of its regulation all evidence gathering techniques not based upon physical contact with a place in which the evidence was located. In this view, Petitioner is clearly mistaken. The Fourth Amendment, by its language, does not deal with non-contact situations, but, on the contrary, deals only with circumstances of physical contact. It follows that an adjudication which does no more than corroborate the objective meaning of that Amendment's language can hardly be said to render it a nullity, however consistent or inconsistent that adjudication may be with other decisions of this Court.

Petitioner makes the surprising comment on page 21 of his Reply Brief that the Respondent offers no rationale for the contact theory "other than that it would permit certain wiretapping". One can only conclude that Petitioner has not carefully read Respondent's Brief; if he had, he would have become aware that Respondent's contact theory is justified by a carefully stated rationale founded upon the dual considerations of constitutional doctrine and judicial high policy. It would serve no useful purpose to restate Respondent's carefully developed line of argument at this point; instead the Court is respectfully referred to pages 42 through 56 of Respondent's Brief and the rather elaborate body of insights there set forth.

Petitioner argues on page 21 of his Reply Brief that Respondent's contact theory is inconsistent with this Court's holding in *Katz*. However, as Respondent indicates on pages 43 through 45 of his main Brief, the precise contents and scope of the *Katz* holding are not free from doubt and the Court should use this case as a vehicle of clarification so as to achieve those proper objectives of a sound judicial statesmanship which Respondent commends to its attention.

Petitioner claims on pages 22 and 23 of his Reply Brief that "the 'contact' which the Respondent" envisions "was in fact present in the instant case" since the wiretap equipment was installed in the basement of the hotel in which the Headline Bar was located. It is true that the wiretap equipment was installed in the hotel basement. However, the wiretap equipment did not make contact with the structure in which was located the telephone instrument on which the conversations in question took place. The telephone instrument was in the Bar on the floor above the basement. The basement of the hotel was divided by a physical partition so as to allocate a segregated portion of the basement underneath the Headline Bar for the use of the Headline Bar. The wiretap equipment was never placed within the portion of the basement allocated to the Headline Bar nor did it ever come into physical contact with the wall or partition marking off and bounding this portion of the basement. On the contrary, the equipment was located in the part of the basement used by the hotel, and, since the hotel was a busines separate from the Headline Bar operation, it can hardly be said that the wiretap equipment made contact with the structure in which occurred the overheard telephone conversation.

If Petitioner's argument to the contrary be accepted, it would follow that a guest in any hotel room in the building has standing to object to the legality of a search anywhere in the building outside of his own room.

The record shows (R. 140) that the wiretapping detectives obtained permission from a hotel official to place the wiretap equipment in the basement of the hotel. Thus even if the Headline Bar had used this same portion of the basement, the wiretapping in question would not have constituted a trespassory eavesdrop. Indeed, even if the place where the wiretap equipment was located be considered a portion of the Headline Bar establishment, the same legal conclusion is pertinent. The hotel official's

permission to install the equipment amounted to a consent just as surely as if the proprietor of the Headline Bar had consented to the installation of eavesdrop equipment in the Bar. Therefore, even if the wiretapping herein was regulable under the Fourth Amendment, and was considered a search, it amounted to a consent search.

It follows that all questions as to the validity of the form of the wiretap order and its execution are thus waived or rendered academic, just as they would be if an official with a defective search warrant were permitted to search a premises by consent of its owner. Moreover, the defendant did not raise the trespass argument at the trial or cite it to the Court as the basis for an objection to the admission in evidence of the wiretaps nor was it raised on appeal until the submission of Petitioner's Reply Brief in this Court.

G. Petitioner's Reply Brief Does Not Effectively Deal with Respondent's Contention that the Telephone Conversations in Question Did Not Occur in a Situation of Privacy.

The protected classes enumerated in the language of the Fourth Amendment are "persons, houses, papers and effects" and thus a crucial issue in this case (at least in the light of this Court's decisions before *Katz*) is whether the public bar where the phone instrument in question was located had sufficient attributes of the privacy of a home to activate the Fourth Amendment (see *Lanza* v. *New York*, 370 U.S. 139, 143). If the area in which the overheard conversation took place was one which could have been searched for physical objects without a warrant (and the Headline Bar is such an area since it is a public bar and is subject to extensive governmental regulation), then an eavesdrop in the area might proceed without a warrant (*Lanza* v. *New York*, 370 U.S. 143-144, n. 14).

Some observers may view *Lanza* as a "protected area" case and as rendered obsolete by *Katz*. However, Re-

spondent urges that the *Lanza* doctrine may be assimilated to the *Katz* approach (even assuming, contrary to the opinion of Justice Harlan, that *Katz* totally repudiated the protected area rule) since the rationale of *Lanza* may be interpreted as based upon the finding that the area in question—there a jail visiting room—was not private in character and since the *Katz* rule of justifiable expectation of privacy seems founded upon a similar objective test of whether the situation in which the conversation occurred was so private in nature as to give rise to a reasonable expectation of privacy.

Moreover, it would appear that *Katz* did not really reject the protected area theory. The *Katz* rule seems to mandate Fourth Amendment protection where there is a justifiable expectation of freedom from governmental intrusion of the type involved in *Katz*. In *Katz*, the intrusion involved was *electronic* penetration of the place or location in which the defendant was talking. There was no such penetration on this occasion. That this interpretation of *Katz* is correct may be gathered from this Court's language interpreting *Katz* in its later decision in *Mancusi* v. *De Forte* (20 L. ed. 2d 1154) where, on page 1159, this Court said: "The Court's recent decision in *Katz* v. *United States* . . . also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded *place* but upon whether the *area* was one in which there was a reasonable expectation of freedom from governmental intrusion . . . The crucial issue, therefore, is whether, in the light of all the circumstances De Forte's office *was such a place*". (Emphasis supplied.)

H. Petitioner's Objections to Respondent's Argument that the Wiretap Order Herein and Its Execution Were Not Violative of Fourth Amendment Standards Is of Questionable Force.

On page 30 of his Reply Brief, Petitioner addresses himself to Respondent's contention that the overheard con-

versations were not "seized" within the meaning of the Fourth Amendment when they were overheard, but, only, if at all, when they were used in Court. Petitioner declares that "this preposterous assertion is devoid of any logic whatsoever". Presumably, then, Petitioner would also regard as "preposterous" the view that Mr. Justice Harlan expressed in dissent in *Berger* v. *New York* to the effect that "'conversations are not 'seized' either by eavesdropping alone, or by their recording. . . Just as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, so some use of the conversations beyond the initial listening process is required for the seizure of the spoken word. . .'" (388 U.S. 41, 98-99).

On page 32 of his Reply Brief, Petitioner appears to argue that wiretapping can not easily be brought within the permissive scheme set forth in the warrant clause of the Fourth Amendment because that clause does not contemplate an authorizing warrant permitting the seizure of something which has not yet come into existence. The short answer to this observation is that it proves only, if anything, that wiretapping is not controlled by the Fourth Amendment and that the difficulty which Petitioner mentions arises from an attempt to apply the Fourth Amendment to a situation which is not contemplated by its language or legislative history.

However, if the Court should hold that wiretapping is within the regulatory ambit of the Fourth Amendment, it would follow that the permissive authorization of the warrant clause of that Amendment would apply to wiretapping as well as to all other related categories of evidence gathering within the governance of the constitutional provision on search and seizure. A different holding would amount to a re-writing of the Fourth Amendment's warrant clause so as to incorporate within its language a provision excluding one particular form of evidence gathering—i.e., wiretapping—from that broadly inclusive language of the warrant clause which seems to comprehend within its scope

all of the official activities within the control of the Fourth Amendment.

On page 25 of his Reply Brief, Petitioner declares that Respondent's arguments to the effect that the telephone conversations did not occur in a situation of privacy is interestingly contrasted "with his later argument that notice need not be given upon the execution of a wiretap warrant" because it would warn the conversants that their conversation was being overheard. It is difficult to determine from this vague allusion exactly why Petitioner finds this so called contrast interesting. If he means to suggest that it reflects an inconsistency he is surely mistaken.

First of all, Respondent's argument that the requirement of notice be dispensed with was a general one based upon a general view of the effect of requiring prior notice; it was not specifically directed to the facts of this case. Furthermore, Respondent's contention that the conversations in question did not occur in a situation of privacy was not based upon the view that the conversants were aware that they were being overheard, but on the different conclusion that the objective facts of the situation would not justify a reasonable man in expecting privacy. Petitioner responds, on page 25 of his Reply Brief, to Respondent's argument that such a rigorous regime of control would seriously dijectionable where it fails to conform to a nicety with all of the eavesdrop criteria read into the Fourth Amendment in such cases as *Berger*. Respondent argued in his Brief that such a rigorous regime of control would seriously diminish the availability of wiretap evidence and that a judicious balancing of interests counsels some relaxation of *Berger* type standards in wiretap cases. Respondent cited this Court's *Camara* decision in support of this approach.

Petitioner, on page 25 of his Reply Brief, argues that *Camara* can not be cited for the proposition that wiretapping should be governed by separate criteria. However, Respondent did not cite it for this narrow proposi-

tion but rather as authority for the contention that the warrant clause of the Fourth Amendment may receive a relaxed interpretation in appropriate situations.

I. Respondent's Imaginative Rehearsal of the Possible Consequences of a Decision in Favor of Petitioner Was Well Within the Limits of Sound Constitutional Advocacy and Petitioner's Objection to This Methodology of Argumentation Proceeds from an Imperfect Understanding of the Demands of Judicial Statesmanship or the Nature of Judicial Policy Making.

On pages 20 and 38 et seq. of his Reply Brief, Petitioner appears to suggest that it is not the function of constitutional advocacy to suggest to this Court the possible practical and legalistic results of alternative forms of decision. Petitioner's viewpoint seems to proceed from an insensitivity to the imperatives of judicial statesmanship in a political scheme in which the constitutional court exercises substantial policy making powers.

In the judicial interpretation of vague constitutional texts, adjudicatory discretion is left at large and constitutional adjudication is thus a largely autonomous process of policy making. Thus it is important that the judging tribunal identify all of the social interests which may be affected by its act of decision and foresee, so far as possible, the relative effects on these interests of a given form of decision. In the absence of such judicial forevision, constitutional judgment would operate blindly and with indifference to the practical effects of its performance. If constitutional advocacy is not permitted to pose those possibilities inherent in the context of adjudication, it will fail in its responsibility of giving meaningful assistance to those who were charged with the excruciating burden of decision. There seems to be no sound principle on which such a stringent limitation of the role of constitutional advocacy may be justified.

In the nature of the case, the possible consequences of judicial decision must be posed in speculative terms. Indeed, even in the legislative forum, the prospective results

of policy making decisions can not be rendered in predictive statements framed in terms of certainty. No doubt it was its recognition of the essentially tentative nature of the process of official decision making which prompted this Court to indicate in *Noble State Bank* v. *Haskell* (219 U.S. 104) that legislative policy may properly rest upon possibility rather than certainty and that the Constitution does not require that the exercise of government be founded upon a prophetic vision beyond the power of human intellect to attain.

In responding to what he conceives to be the philosophic standpoint exhibited in Respondent's Brief, Petitioner declares, in implied criticism of Respondent's approach, that "to cast the issue in activist and anti-activist terms is simply to avoid the issue"; but the Respondent did not cast the issue in these simple terms; to argue thus is to abstract a phrase from the context of a developed formulation and to violate by omission the full intent of Respondent's argument.

CONCLUSION

The Judgment of Conviction Should Be Affirmed.

Respectfully submitted,

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